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No.

In The Supreme Court of the United States

October Term, 1986

MATTHEW SETERA, *Petitioner, Pro Se*

vs.

TEXAS A & M UNIVERSITY

George W. Kunze, Dean, Graduate College

Frank E. Vandiver, President, Texas A & M University

Jim Mattox, Attorney General, State of Texas

Defendants, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL APPENDIX

MATTHEW SETERA, *Petitioner, Pro Se*
9 Cumberland Street
Cumberland, Rhode Island 02864

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

MATTHEW SETERA, plaintiff,	:	
vs.	:	C. A. No. 85-0653-S
TEXAS A & M UNIVERSITY, GEORGE W. KUNZE, DEAN, GRADUATE COLLEGE, FRANK E. VANDIVER, PRESIDENT, TEXAS A&M UNIVERSITY, and JIM MATTOX, ATTORNEY GENERAL, STATE OF TEXAS, defendants.	:	Memorandum and Order

BRUCE M. SELYA, United States District Judge.

The plaintiff, Matthew Setera, appearing pro se,

filed an amended complaint[1] with this court on January 30, 1986, against Texas A&M University and various state officials in their representative capacities.[2] The defendants moved to dismiss. The plaintiff has objected.

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[1]The plaintiff's original complaint, docketed in late 1985, was never served on the defendants. Instead, Setera filed and served an amended complaint as of right. Fed. R. Civ. P. 15(a). That document henceforth will be referred to as the "complaint."

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[2]There is no suggestion in Setera's complaint that he is suing defendants Kunze, Vandiver, and Mattox in their individual capacities. To the contrary, Paragraph 2 of the complaint, which describes the defendants, indicates that the three state officials are sued solely in their official capacities. Moreover, the plaintiff's recitation of the events upon which his complaint is based is devoid of reference to these individuals. See Complaint at ¶¶ 5-9.

The complaint, in its principal thrust, is brought pursuant to 42 U.S.C. § 1983 and the fourteenth amendment. Setera, a former doctoral candidate at Texas A&M, apparently alleges that the university's catalogue and handbook on rules and regulations created a contract between him and the defendants, and that the failure of the defendants to permit the plaintiff to sit for his examinations constituted a breach of contract. The plaintiff also alleges that the pursuit of the degree constituted a property right, such that defendants' denial of plaintiff's opportunity to complete his schooling violated his civil rights in violation of the fourteenth amendment. While the plaintiff makes

other assertions (for example, that his rights were violated when his financial assistance was discontinued), the gist of his case appears to be that he was denied a property right in violation of the due process clause of the federal Constitution. Setera prays exclusively for monetary relief in the form of compensatory, consequential, and punitive damages. The complaint makes no request for reinstatement into the doctoral program at Texas A&M; it neither mentions nor hints at any desire to secure injunctive and/or declaratory relief.

In their motion to dismiss, the defendants claim that the suit is barred by the eleventh amendment and that

the court lacks subject matter jurisdiction because a state agency is not a "citizen" for purposes of diversity jurisdiction. In the alternative, the defendants solicit transfer of the action to the United States District Court for the Southern District of Texas. This court need not wander beyond the first ground of the defendants' motion. Setera's suit is barred by the eleventh amendment.

The eleventh amendment deprives a federal court of jurisdiction over "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U. S. Const., Amend. 11. The amendment prohibits suits for monetary relief by private parties against a state (and its agencies), unless the state has

consented to be sued, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 (1984); Alabama v. Pugh, 438 U.S. 781, 782 (1978); Edelman v. Jordan, 415 U.S. 651, 663 (1974); Healey v. Bendick, C. A. No. 85-0341-S, slip. op. at 30-32 (D.R.I. Feb. 12, 1986), and then, only in manner and form as permitted by the tenor of the consent. See cases ante.

Congress, of course, pursuant to a valid exercise of its powers, may act to abrogate eleventh amendment immunity. Pennhurst, 465 U.S. at 99; Healey, slip op. at 31-32. But, contrary to Setera's remonstrance, see Plaintiff's Memorandum at 1, the enactment of 42 U.S.C. § 1983

did not work such an abrogation; the Supreme Court has held repeatedly that the eleventh amendment bars suits under § 1983 against entities and officials so closely affiliated with the state as to make the state the real party in interest. Quern v. Jordan, 440 U.S. 332, 338-45 (1979); Pugh, 438 U.S. at 782; Edelman, 415 U.S. at 663-64. Although the plaintiff alludes to other provisions of the Civil Rights Acts as well, e.g., Plaintiff's Memorandum at 1, they need not be discussed; none of them are engaged by any of the factual averments of the complaint. And, the bootstrap argument that Congress's grant of general federal question jurisdiction, 28 U.S.C. § 1331, suffices to override the eleventh amendment is palpably wrong.

To determine whether the entity sued, Texas A&M University, is an arm of the state or an independent political subdivision, see Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 280 (1977), a court must examine the legal relationship between the entity and the state. See Jagnandan v. Giles, 538 F.2d 1166, 1173 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977). As the Fifth Circuit pointed out:

> If Texas A&M University is an arm of the state such that any recovery of damages would, in effect, be against the state, to come from the state treasury, the Eleventh Amendment would bar the action and recovery. If the University is an independent political body or has in some manner waived its immunity, however, monetary recovery would not impinge on the Eleventh Amendment.

Gay Student Services v. Texas A&M University, 612 F.2d 160, 165 (5th Cir. 1980) (footnotes omitted).

Following these directives, a Texas district court conducted a lengthy and well-reasoned study of the relationship between Texas A&M and the State of Texas and concluded that "a suit against the University or its officials for monetary relief is a suit against the state and thereby barred by the Eleventh Amendment." Zentgraf v. Texas A&M University, 492 F. Supp. 265, 271 (S.D. Tex. 1980). The close relationship between the school and the state "persuaded [the court] that Texas A&M University is an alter ego of the State of Texas." Id. at 272 (emphasis in text). In

addition, the Zentgraf court found that Texas had not waived its eleventh amendment immunity to suit. Id.

The Fifth Circuit has followed the reasoning and conclusion of Zentgraf to bar suits seeking monetary relief from Texas A&M. See Gay Student Services v. Texas A&M University, 737 F.2d 1317, 1333-34 (5th Cir. 1984). And, other federal courts have reached essentially the same outcome in surveying the status of other state-operated institutions of higher learning in Texas. E.g., LeCompte v. University of Houston System, 535 F. Supp. 317, 319 (S.D. Tex. 1982); Henry v. Texas Tech University, 466 F. Supp. 141, 145-47 (N.D. Tex. 1979). There is no doubt that these

precedents are determinative with respect to this plaintiff's suit against Texas A&M. (Setera's suggestion that Rhode Island law is somehow material on this point, Plaintiff's Memorandum at 2, is not well-taken.)

The suit must also fail as against the remaining defendants. As mentioned, see ante n.2, each is sued in a purely representative capacity (Kunze and Vandiver, respectively, as officials of Texas A&M; Mattox as the state's attorney general). For this reason, these defendants also partake of the prophylaxis of the eleventh amendment. See Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 n. 55 (1978) (official-capacity suits "represent only another way of pleading an action against an entity of

which an officer is an agent"). What this court recently observed in Healey, slip op. at 351, is equally apropos to the case at bar:

> This action, insofar as it seeks to impose liability on these defendants in their official capacities, in reality seeks to impose liability on the state itself. The Eleventh Amendment to the federal Constitution stands squarely in the way.

It is plain that the damages which Setera seeks, if awarded against any of the present defendants, would be paid from the public fisc. See Tex. Rev. Civ. Stat., art. 6252-26, § 1(a)(2) (Vernon 1972 & Supp. 1979). The state is, therefore, the real party in interest, and the blanket of sovereign immunity enswathes all of the named defendants.

The final string to the plaintiff's bow is his attempted invocation of this court's diversity jurisdiction. 28 U.S.C. § 1332(a). It is well settled that neither a state nor a state agency can be considered a "citizen" for diversity purposes. See id. See also Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 487 (1894) ("A State is not a citizen. And, under the Judiciary acts of the United States, it is well settled that a suit between a State and a citizen or a corporation of another State is not between citizens of different States; and that the [federal court] has no jurisdiction of it unless it arises under the Constitution, laws or treaties of the United States.") Thus,

there can be no diversity of citizenship between Setera and the university.

As to the individual defendants, three additional observations are pertinent: (i) as each is sued only in his representative capacity, see ante, the same rule ought to apply, (ii) the plaintiff, who has the burden of alleging facts sufficient to demonstrate the court's jurisdiction, has not set forth the citizenship of any of the defendants or any other facts demonstrating an acceptable jurisdictional predicate;[3] and (iii) the complaint, even when read with

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[3] "[F]ederal jurisdiction cannot be assumed but must be clearly shown." Brooks v. Yawkey, 200 F.2d 663, 664 (1st Cir. 1953).

the indulgence to be accorded to a pro se suitor, Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam), fails to state any claim whatever against any of these defendants. Though the plaintiff has chosen to represent himself in this litigation, the court's liberality cannot extend to the conjuring up of unpled allegations. McDonald v. Hall, 610 F.2d 16, 19 (1st Cir. 1979). It is, of course, settled beyond peradventure that a complaint which "lacks a minimally sufficient factual predicate...cannot stand." Cok v. Fay, C. A. No. 85-0097-S, slip op. at 4 (D.R.I. July 18, 1985). See also Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977). And, the sockdolager is simply this: the elev-

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enth amendment obstacle looms equally large as to the state law breach of contract claim which Setera sponsors under the aegis of diversity jurisdiction.

The court does not question the sincerity of the plaintiff's thinly-veiled indignation at what he perceives as a grievous wrong, and the court sympathizes with Setera's frustration in the face of "all the pertinent garbage that goes on in these courthouses." Plaintiff's Memorandum at 4. Yet, what the plaintiff tosses lightly aside as "garbage" are the very rules of law which insure fairness and justice in our society. These rules cannot be trampled by any man, no matter how noble his cause.

For the reasons articulated above, the defendants' motion to dismiss must be, and it hereby is, granted.[4] The case is dismissed for want of subject matter jurisdiction. The clerk is directed forthwith to enter judgment for the defendants for costs.

So ordered.

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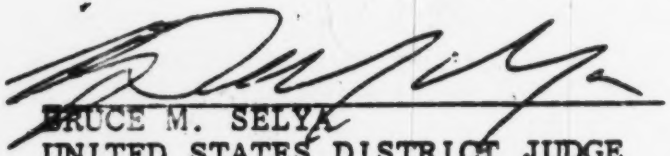

BRUCE M. SELYA
UNITED STATES DISTRICT JUDGE

March 24, 1986

[4]The record in this case suggests severe (perhaps insurmountable) problems anent this court's in personam jurisdiction over each and all of the defendants. The court simply notes those difficulties, without expressing any opinion thereon. In light of the disposition of the case on other grounds, see text ante, it is unnecessary at this time to reach questions of personal jurisdiction. It is likewise unnecessary to consider the defendants' venue contentions. And similarly, the plaintiff's informal request for class action certification, Plaintiff's Memorandum at 3-4, need not be addressed.

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JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT: RHODE ISLAND
CASE TITLE: MATTHEW SETERA V. TEXAS A & M UNIVERSITY ET AL	DOCKET NUMBER: CA 85-0653 S
	NAME OF JUDGE OR MAGISTRATE: Bruce M. Selya

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is entered for the defendants for costs.

CLERK		DATE
(BY) DEPUTY CLERK: Lorraine Lizzi		3/24/86